

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

RITA I. FALZONE

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Period October 1, 1980  
through August 5, 1982.

---

Petitioner, Rita I. Falzone, 76 East Maplemere Koad, Williamsville, New York 14221, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period October 1, 1980 through August 5, 1982 (File No. 49216).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on February 25, 1986 at 10:45 A.M. Petitioner appeared by Theodore C. Spang, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

#### ISSUE

Whether petitioner is liable for the penalty asserted against her pursuant to section 685(g) of the Tax Law with respect to withholding taxes due from John Tata Concrete Construction Corporation.

#### FINDINGS OF FACT

1. On November 28, 1983, the Audit Division issued a Notice of Deficiency along with a Statement of Deficiency to petitioner, Rita I. Falzone, asserting a penalty equal to the amount of unpaid withholding tax which the Audit Division had determined was due from John Tata Concrete Construction Corporation ("the

corporation"). Said notice asserted that \$14,442.00 was due for the period October 1, 1980 through August 5, 1982.

2. At all times during the period at issue, petitioner was vice-president of the corporation and owned 40 percent of the stock of the corporation, which was started by petitioner's father in 1954. Petitioner's brother, Salvatore John Tata, was president of the corporation and also owned 40 percent of the corporation's stock. Mr. Tata ran the corporation on a daily basis and, although he did not own a majority of its shares, he was, in effect, in control of the corporation.

3. Although petitioner held the title of vice-president of the corporation, she had no official duties related to that title and she was in no way involved in the day-to-day business of the corporation. Prior to the years at issue, petitioner had received, as a shareholder, an annual subchapter S distribution from the corporation. At Mr. Tata's urging, she reinvested most of these distributions in the corporation. At no time did petitioner receive a salary from the corporation.

4. Late in 1980, petitioner began to suspect that Mr. Tata was diverting corporate funds for his own purposes. She requested access to the books and records of the corporation and was refused such access by Mr. Tata. She subsequently commenced a shareholder's derivative action against Mr. Tata to prevent further depletion of the remaining corporate assets. Pursuant to this action, petitioner sought and was granted relief by the court allowing her access to the corporation's books and records and requiring all corporate expenditures to be made by check bearing the signatures of both petitioner and Mr. Tata. This relief was granted by order of the Supreme Court of the State of New York, Erie County, on July 21, 1981.

5. Subsequent to July 21, 1981, petitioner co-signed with Mr. Tata approximately ten checks on the corporation's behalf. Most of these checks were issued in payment of subcontractors of the corporation. Petitioner signed these checks after each had been drawn up and executed by Mr. Tata. Petitioner signed no payroll checks on behalf of the corporation.

6. Petitioner was not involved with the corporation's payroll, nor was she in any way involved with the filing of any tax returns on the corporation's behalf. She had no authority to hire or fire employees.

7. Subsequent to the granting of the aforementioned court order, petitioner continued to encounter difficulty from Mr. Tata in gaining access to the corporation's books and records.

8. In August, 1982, the corporation filed for bankruptcy and ceased operations.

#### CONCLUSIONS OF LAW

A. That where a person is required to collect, truthfully account for and pay over withholding taxes and willfully fails to collect and pay over such taxes, section 685(g) of the Tax Law imposes on such person "...a penalty equal to the total amount of tax evaded, or not collected, or not accounted for and paid over."

B. That section 685(n) of the Tax Law defines "person," for purposes of section 685(g) of the Tax Law, to include:

"...an individual, corporation or partnership or an officer or employee of any corporation...who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

C. That whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes during the period in issue is a

988 Matter of MacLean v. State Tax Commission, 69 A.D.2d 951, aff'd 49 N.Y.2d 920). Factors which are relevant to this determination include whether the individual signed the corporation's tax returns, derived a substantial part of his income from the corporation and possessed the right to hire and fire employee (Matter of Amengual v. State Tax Commission, 95 A.D.2d 949, 950; Matter of Malkin v. Tully, 65 A.D.2d 228, 299). Other factors considered are the amount of stock owned, the authority to pay corporate obligations and the individual's official duties (Matter of Amengual v. State Tax Commission, supra).

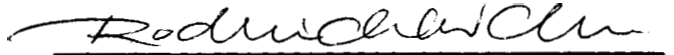
D. That petitioner was not a person required to collect, truthfully account for and pay over the withholding taxes of John Tata Concrete Construction Corporation within the meaning of section 685(g) of the Tax Law. Although petitioner held the title of vice-president of the corporation and owned 40 percent of its stock, she had no involvement whatever in the day-to-day running of the corporation; she was not involved in the filing of any of the corporation's tax returns; she possessed no authority to hire or fire employees; and she received no salary from the corporation. Further, it is noted that petitioner had to resort to the extreme of obtaining a court order merely to gain access to the corporation's books and records and, even after the order was granted, she still encountered difficulty in gaining such access. Petitioner's involvement with the corporation was limited to that of an investor. When she became aware that her investment might be lost, she sought to rectify the situation by commencing a shareholder's derivative action. The limited check-signing authority which she obtained as a result of the court action did not change her status to that of a "person" within the meaning of section 685(n), of the Tax Law. Accordingly, petitioner is not liable for the penalty imposed pursuant to section 685(g) of the Tax Law.

E. That the petition of Rita I. Falzone dated is granted and the Notice of Deficiency dated November 28, 1983 is hereby cancelled.

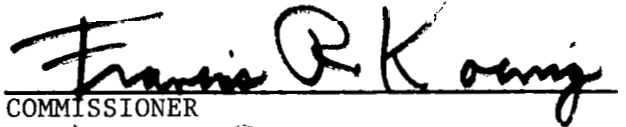
DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986



PRESIDENT



COMMISSIONER



COMMISSIONER